Supreme Court, U.S.
FILED
OCT 17 1994
OFFICE OF THE CLERK

(1)

94-521

In The

United States Supreme Court

October Term 1994

Jessie L. Spencer,
Petitioner

vs.

Mrs. Baird's Bakery and
International Brotherhood of the
Teamsters Union Local #988,
Respondent

Petition for a Writ of Certiorari to the
United States Court Of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

Jessie L. Spencer
Petitioner Pro Se
10125 Rockaway
Houston, Texas 77016
(713) 631-9360

52 pp

QUESTION PRESENTED

1. Is discrimination against and employee prohibited, and a person may not discharge or in any other manner discriminate against an employee because the employee has filed a workers' compensation claim in good faith, and was terminated from employment while under the doctor's care, drawing workers' compensation in violation of 451.001 discrimination against employees prohibited?

2. Does a lawyer violate Texas code of p. ofessional responsibility of the Texas disciplinary rule of professional conduct, code printed version's Texas codes annotated volume 3 of the government code title 2 subtitled G appendix A article X section 9 when she is allowed to file a case in the United States District Court and not licensed to do so at the time?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citation iii

Opinions Below 2

Jurisdiction 3

Constitutional Provision Involved 3

Statement of the Case 3

Reasons for granting the Writ 5

[1.] The United States Supreme Court, unlaw..... ful termination from employment in violation of article 8307c of the Workers' Compensation Law. 5

[2.] In this case strong indication exist of fraud, misrepresentation excusable neglect and conspiracy. 6

Conclusion 9

Appendices [iv] ..... 1a - 38a

TABLE OF CITATIONS

Page

Cases Cited:

Britt v. Sherman Foundry

(civ. app. 1980) 608 S.W.2D338. 7

Borden, Inc. v. De La Rosa

(app. 13 dis 1991) 825 S.W.2D710.

vacated 831 S.W.2D304. 8

Gates v. City of Fort Worth

(civ. app. 1978) 567 S.W.2D871.ref.n.r.e 8

U.S. Constitution cited:

Fifth Amendment 3

APPENDICES

Page

Appendix A – Judgment of the Court of Appeals ..1A

Appendix B – Memorandum Order of the District Court 5A

Appendix C – Exhibits 22A

The petitioner Jessie L. Spencer respectfully prays that a writ of certiorari issue to review the summary judgement and decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 30, 1993 and the order of said court entered here in on July 20, 1994.

OPINIONS BELOW

The judgement of the Court of Appeals affirmed upon a brief opinion the District Court's (Kenneth Hoyt) memorandum order entered herein on June 30, 1993 which dismissed petitioner's complaint on the respondent's motion for summary judgement. The said judgement of affirmance and the underlying opinion are unreported and are reproduced in Appendix A to this petition.

The memorandum order of the District Court is reported as Jessie L. Spencer v. Mrs. Baird's Bakeries, and the International Brotherhood of the Teamsters Union Local #988 and is reproduced in Appendix B to this petition.

On June 15, 1993 Petitioner timely filed a motion with the district court pursuant to rule 60(b), fed.rul.civ.proc. his motion for relief from order granting respondent summary judgment on May 18, 1993.

Motion for reconsideration of May 18, 1993 granting summary judgement declined June 30, 1993. The decision is reproduced in appendix C, as exhibit D.

JURISDICTION

The judgement of the Court of Appeals was entered on July 20, 1994, although the time of entry is not noted, this petition was served and filed within ninety (90) days of the latter date. The jurisdiction of this court is invoked under Title 28, United States Code.°1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States read in relevant part:
No person shall … be deprived of life, liberty, or property, without due process of law …

STATEMENT OF THE CASE

On November 15, 1989 petitioner injured his back while at work. On April 9, 1990 back surgery was performed by Dr. (Ravdel) and Dr. (Andrews), for the removal of L 4 and L 5 disc.
Petitioner received a letter dated June 5, 1990 from Mrs. Baird's Bakery threatening to terminate petitioner employment.

A letter dated June 18, 1990 to Mrs. Baird's plant manager Mr. (Jerry Land) from attorney (Stephen

Perel) requested Mr. (Land) to review article 8307c of the Texas Workers' Compensation Act concerning any termination of petitioner due to his worker compensation claim. See Exhibit E.

On July 23, 1990 a letter written to Mr. (Jerry Land), by the company doctor, Dr. (Andrews), stated, after consulting with and evaluating petitioner on July 17, 1990 just over three months after surgery returning to regular duties at this time was not advisable. Petitioner would require six months to one year before engaging in frequent bending, hauling, pushing or heavy lifting.

On October 23, 1990 while still under the doctor's care drawing workers' compensation, petitioner was terminated from employment. Letter issued October 23, 1990 for termination to be effective November 1, 1990.

On October 24, 1990 petitioner filed a grievance with local union number 988 of the Teamsters Union.

On January 15, 1991 petitioner filed a complaint with the E.E.O.C. against Mrs. Baird's Bakery and the International Brotherhood of Teamsters Union Local 988. The E.E.O.C. gave petitioner the right to file suit. In December 1991 suit was timely filed. On February 26, 1992.

REASON FOR GRANTING THE WRIT

[1.] THE UNITED STATES SUPREME COURT UNLAWFUL TERMINATION FROM EMPLOYMENT IN VIOLATION OF ARTICLE 8307C OF THE WORKERS' COMPENSATION LAW.

Discrimination against employees prohibited. A person may not discharge or in any other manner discriminate against an employee because the employee has:

(1.) filed a Workers' Compensation Claim in good faith,

(2.) hired a lawyer to represent the employee in a claim,

(3.) instituted or caused to be instituted in good faith a proceeding under subtitle A: or

(4.) testified or is about to testify in a proceeding under subtitle A.

Petitioner was terminated from employment while under company doctor's care, drawing Workers' Compensation.

In this case the core findings reflected in the Dis-

trict Court's reported decision were generated from evidence adduced by petitioner's deposition hearing by the respondent.

Although petitioner filed a motion with the District Court for referral to mediation for his unlawful termination, and discrimination case, the District Court denied that motion.

[2.] In this case strong indication exist of fraud, misrepresentation, excusable neglect and conspiracy.

Petitioner counsel of record at the time of filing this complaint in the United States District Court, represented to me that she would file and prosecute my case in Federal Court was not licensed to practice in the Southern District at the time of filing petitioner's case in court. See (Exhibit G) a letter written to (Judge Hoyt) dated December 18, 1992.

A motion was filed by moving counsel on October 28, 1992, that motion was denied because (Judge Hoyt) said that it was the policy of his court that counsel not withdraw without a substitute counsel in place and it must be approved by plaintiff. This did not happen.

Although (D. Jennings) misrepresented to the

court that (J. Larry III) was the attorney in charge, the District Court dismissed counsel and left petitioner without counsel on December 15, 1992.

Motion to withdraw as of counsel by (Joseph R. Willie) was filed December 18, 1992 stating to the Judge of said court, (Ms. Jennings) has not complied with rules 2D and E of the Local Rules of the Southern District of Texas and requested that the District Court conduct an investigation into the professional conduct of (Jennings). See Exhibit ii Motion to Withdraw as Additional Counsel, see (Julius J. Larry III.) Exhibit B. See Exhibit C Unauthorized and Deceptive Involvement Letter written to (Judge Hoyt.). By the firm of Ahmed and Hubbard.

Petitioner timely filed a grievance on October 24, 1990 because of his unlawful termination from employment, his union did not represent him. The respondent falsely misrepresented to the District Court that a grievance procedure at the first step of the grievance procedure took place, and petitioner was present.

See Britt v. Sherman Foundry (civ. app. 1980)

608S.W.2D338.

Employer was not precluded from bringing an action for wrongful discharge against employer where only first step in grievance procedure provided by contract between union and employer was followed in that there was no final settlement of determination under the union grievance proceedings. See Borden, Inc. v. De La Rosa (app. 13 Dist 1991) 825 S.W.2d710. vacated 831 S.W.2d 304.error granted.

Employer's policy of terminating employees who has been on Workers' Compensation for period in excess of six months violated provision of Workers' Compensation Act prohibiting discrimination against employees who file claims.

See Gates v. City of Fort Worth (civ. app. 1978) 567 S.W.2d 871. ref.n.r.e. Reading In part, remedies available to an employee who is terminated by his employer for the good faith exercise of his rights under the Workmen's Compensation Law remain available to him under that statute in a situation where his grievance was properly filed by him but was not resolved through efforts of the union and the employer.

CONCLUSION

For the reasons stated herein petition, for a Writ of Certiorari should be granted.

Respectfully submitted,

s _____

JESSIE L. SPENCER

Petitioner Pro Se

February, 1995

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2582
Conference Calendar
D.C. Docket No. CA-H-92-632

JESSIE L. SPENCER,

Plaintiff–Appellant,

versus

MRS. BAIRD'S BAKERIES, INC.,
and INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, Local Union No. 988,

Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of Texas
Before POLITZ, Chief Judge, and JOLLY, and DAVIS,
Circuit Judges.

J U D G E M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

District Court in this cause is affirmed.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgement of the District Court in this cause is affirmed.

July 20, 1994

ISSUED AS MANDATE:

No. 93-2582

Conference Calendar

JESSIE L. SPENCER,

Plaintiff-Appellant,

versus

MRS. BAIRD'S BAKERIES, INC.
and INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, Local Union No. 988,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges. PER CURIAM:

Jessie L. Spencer contends that he is entitled to relief from a summary judgment order for the defendants pursuant to Fed. R. Civ. P. 60(b)(1) and (6). The district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion Seven -Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981). "It is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion." Id.

Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Spencer analogizes his case to Eskenazi, in which this Court found that the district court abused its discretion when it determined that the defendants were not entitled to Rule 60(b) relief because the defendants asserted a meritorious defense and because they had had no opportunity to present their side of the controversy before the plaintiff won a default judgment. Eskenazi, 635 F.2d 402-04. Spencer's case is not analogous to Eskenazi. Although Spencer's attorney sought to withdraw like the attorney in Eskenazi, the district court gave Spencer notice that he should retain another lawyer and required that respond to the pending motions before granting her motion for withdrawal. Moreover, Spencer presented his side of the controversy not just once, but twice, in the form of his lawyer's response to each defendant's motion for summary judgement and his pro se responses. The record does not indicate that Spencer's failure to retain counsel had any impact on the court's decision to grant summary judgment. The court's opinion reflects that it considered the responses filed by Spencer and his council when it decided the case on the merits. Accordingly, Spencer fails to show that the district court's denial of his Rule 60(b) motion was so unwarranted as to constitute an abuse of discretion. The judgment of the district court is AFFIRMED.

APPENDIX B - MEMORANDUM ORDER

OF THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON - DIVISION

	§	
JESSIE L. SPENCER,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	H-92-0632
MRS. BAIRD'S BAKERIES, INC.,	§	
THE INTERNATIONAL	§	
BROTHERHOOD OF TEAMSTERS	§	
LOCAL UNION NO. 988	§	
Defendants.		

ORDER

Pending before the Court are defendants', International Brotherhood of Teamsters Local Union No. 988 and Mrs. Baird's Baird's Inc., motions for summary judgment (instruments #34 and #37, respectively). Having considered the motions, the responses, the record before the Court and the applicable law, the Court orders that the motions for summary judgement be Granted.

FACTUAL BACKGROUND

The plaintiff filed this action after he was discharged from employment by Mrs. Baird's. The plaintiff was employed as a transport driver until he injured his back in November of 1989. As a result of the injury and subsequent surgery to his back, the plaintiff was unable to return to his job because his job required him to lift 75 to 100 pounds at a time.

The plaintiff had been absent from work for over six months when he received a letter in June of 1990, from Mrs. Baird's inquiring about the state of his health. The letter informed him that it might become necessary to discharge him from employment if he could not obtain an unrestricted work permit from his physician and return to work.

The letter, referred to by Mrs. Baird's as a Step I letter, was issued pursuant to the company's Disability Termination Policy. T his Policy, effective since April of 1983, permits Mrs. Baird's to terminate an employee who has been off work for six months or more to illness or injury. The Policy provides for a two-step process in discharging an employee due to an extended absence.

Initially, the employee receives a Step I letter informing him that he may be terminated if the company does not hear from him and a treating physician within 30 days concerning the employee's ability to return to unrestricted full-time work. Failing to contact Mrs. Baird's and providing an acceptable return date will lead to Step II. A Step II letter notifies the employee of his termination. The Policy is flexible and does not provide for automatic termination of an employee.

The plaintiff never responded to the Step I letter. In July of 1990, the plaintiff received another letter requesting information about his physical status. On July 11, 1990, the plainliff sent a letter to Mrs. Mrs. Baird's stating that he was "unable to lift, bend, stoop or perform any of the duties connected with unrestricted employment" and "no one can project exactly when I will be able to return to work, if ever." The plaintiff's treating physician wrote Mrs. Baird's and informed it that the plaintiff would require an additional six months to one year to recuperate before it would be possible for the plaintiff to engage in his prior activities. The plaintiff's physician also indicated that there was no guarantee that the plaintiff would be capable of

performing his duties even after recuperation.

In October of 1990, in light of the information received from the plaintiff and his physician, Mrs. Baird's met with the plaintiff and discharged him. At that time the plaintiff had been absent from work for almost one year. The plaintiff protested the decision and requested that Mrs. Baird's contact his physician again. Mrs. Baird's complied and received a second letter from the plaintiff's doctor. The doctor again stated that the plaintiff was unable to engage in activities associated with his position and that he could not provide an estimated date when the plaintiff could be expected to perform these duties. The plaintiff's termination was effective immediately.

The plaintiff filed a written grievance with his Union, protesting his termination. He alleged that his discharge was a violation of the collective bargaining agreement in that his discharge violated the "just cause" requirement under the collective bargaining agreement.

The contractual grievance procedure provides that a written grievance be submitted within seven working days of the occurrence of a dispute. The procedure

also requires that the grievance be resolved within seven working days, although this limit may be extended another seven days by mutual agreement. If no settlement is reached during this time. a party must make a written request for arbitration within seven calendar days of the final response of either party. Failure to meet the time limits by either party constitutes a forfeiture under the grievance.

Although the plaintiff filed his initial grievance within the stipulated time period, the dispute was not resolved within seven days. In November of 1990, the plaintiff again met with the Union representative to inquire about the status of his grievance. At this point, seven working days had since passed. Nevertheless, the plaintiff was informed that a meeting concerning his grievance would be held sometime after Thanksgiving. This meeting did not occur.

In late December of 1990, or early January of 1991, the plaintiff met with the same Union representative. T he plainlilf was told at that time that the Union could not proceed with the plaintiff's grievance until the plaintiff obtained an unrestricted work release from his doctor permitting him to return to his prior job. The plaintiff did not meet with a Union representative at any other time for the remainder of

1991, and his grievance remained unresolved.

On January 15, 1991, the plaintiff tiled a complaint against Mrs. Baird's with the Equal Employment opportunity Commission ("EEOC"). His complaint alleged that Mrs. Baird's had discharged him because of his race in violation of the Civil Rights Act. In November of 1991, finding no reasonable cause to believe that the plaintiff's allegation was valid, the EEOC issued him a right-to-sue letter. The plaintiff was also informed at that time by the EEOC that the Union and Mrs. Baird's had agreed to deny the plaintiff's grievance. Nevertheless, on February 13, 1992, the plaintiff met with the Union representative to inquire about the status of his grievance. He was told at that time that his grievance had been withdrawn in November of 1990.

PARTIES CONTENTIONS

The plaintiff filed this action against the defendants alleging breach of the duty of fair representation against the Union and breach of the collective bargaining agreement against Mrs. Baird's. Additionally, he filed a second cause of action against Mrs. Baird's alleging racial discrimination in violation of Title 42 U.S.C. §1981, Title VII of the Civil Rights Act of 1964, and Tex. Rev. Civ. Stat. Ann. art.

5221k §7.01(a) (Vernon 1990).

The plaintiff contends that the Union's failure to proceed through the grievance procedure on his behalf was a breach of the duty of fair representation owed to the plaintiff. He argues that he repeatedly attempted to work through the internal grievance procedure with the Union to resolve his grievance and believed that the Union was still acting on his behalf until February 1992, when he learned that his grievance had been withdrawn.

On his claims against Mrs. Baird's, the plaintiff contends that Mrs. Baird's did not have just cause to dismiss him, and thus, breached the collective bargaining agreement by discharging him. He asserts that the collective bargaining agreement does not permit **Mrs. Baird's to automatically terminate an employee who has been absent from work six or more months** due to illness or injury. He contends that his dismissal was not as a result of his failure to obtain an unrestricted work release, but rather was motivated by his race.

The plaintiff alleges that other similarly situated employees were not terminated after being absent for more than six months, but were instead

given the opportunity to return to work. Essentially, he contends that the Disability Termination Policy was not objectively applied but was applied unfavorably to him because of his race.

To support his contention that his dismissal was racially motivated, the plaintiff cites three other employees, all absent for six or more months due to illness or injury, who were not discharged by Mrs. Baird's. The plaintiff contends that dismissal David Cisneros, Billy Minatera and Clifford Pierce, all nonblack men, were permitted to retain their positions even though they were subject to the Disability Termination Policy. He asserts that these men were given special accommodations or different jobs, neither of which was afforded to him.

The plaintiff contends that David Cisneros, employed as a loader by Mrs. Baird's, underwent foot surgery and was absent from work for over six months. Mr. Cisneros' position required substantial standing, which he was unable to do. He alleges that Mr. Cisneros was not discharged but rather was allowed to bid on and switch to a less strenuous job to accommodate his injury. He contends that he was not afforded this opportunity because he is black.

The plaintiff also named employee Billy Minatrea

as an example of how a similarly situated nonblack was afforded more favorable treatment. He complains that Mr. Minatrea was absent for more than four months because of an injury and upon his return was given a more accommodating office position.

Finally, the plaintiff names former employee Clifford Pierce as a third example. He maintains that Mr. Pierce was ill and absent from work for over one year. He alleges that Mr. Pierce was never given an unrestricted work release but, nevertheless, returned~' to Mrs. Baird's on a part-time basis, for a short time until he retired.

On plaintiff's first cause of action, the defendants argue that the plaintiff's claim is time barred because the plaintiff failed to commence his claim within six months after he discovered, or with the exercise of reasonable

diligence would have discovered, that no further action was taken on his grievance.

In this regard, the Union contends that the plaintiff knew as early as November of 1990, that it was not in compliance with the contract time limits prescribed by the grievance procedure under the collective bargaining agreement. Furthermore, when no meeting occurred after Thanksgiving, the plaintiff was

fully aware that the Union was outside the time limits again. The Union contends that this awareness is evidenced by the plaintiff's deposition testimony in which he reveals that he was of the opinion that the Union had "sold him down the river" as early as December 1990, or early January, 1991, after he met with the Union representative and was told that the Union could not proceed to resolve the grievance without a work release from the plaintiff's physician. The Union argues that the plaintiff filed a charge of discrimination with the EEOC against Mrs. Baird's in January of 1991, because of his belief that the Union had not acted on his behalf concerning his grievance.

Mrs. Baird's adopts the arguments made by the Union in arguing that the claim against it for breach of the collective bargaining agreement is similarly barred by the applicable statute of limitations.

On the plaintiff's second cause of action for racial discrimination, Mrs. Baird's argues that summary judgment is appropriate because the plaintiff has failed to make out his prima facie case. Because the plaintiff was not physically able to perform his job, he was not qualified to maintain his prior position. Further, Mrs. Baird's contends that the

plaintiff was not replaced by a nonminority but, rather, by a black driver; thus, the plaintiff fails to show two necessary elements to establish a prima facie case of intentional discrimination under the theory of disparate treatment.

Finally, Mrs. Baird's contends that the Disability Termination Policy was not applied unequally and that the examples that the plaintiff offers to the Court are not of similarly situated employees. Mrs. Baird's argues that company records show that other non-black employees were terminated under the same Policy. For example, David Engel, a similarly situated Caucasian transport driver, was terminated nine months before the plaintiff. Three other Caucasian employees were also fired under the Policy.

AUTHORITIES/DISCUSSION

A motion for summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. Pro. 56. Once a party seeking summary judgment provides evidence to the Court that demonstrates the absence of a genuine issue of material fact, the non-moving party must "go beyond the pleading and ... designate specific facts showing there is a genuine issue for trial." See

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The nonmovant must provide more than a mere scintilla of evidence to defeat a motion for summary judgment. There must be sufficient evidence upon which a reasonable July could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242 (1986). The nonmovant is not required to provide absolute proof of the~ claims before the Court~; something~ more than mere allegations and conclusions is required. Slaughter v. Allstate Insurance Co., 803 F.2d 857 (Sth Cir. 1986).

RACIAL DISCRIMINATION CLAIMS

The plaintiff's claim brought under 42 U.S.C. §1981 is dismissed. The Supreme Court has held that race discrimination claims are not actionable under §1981 where the conduct complained of occurs after the formation of a contract. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Section 1981, protects the right to make contracts, free of discrimination, however, it does not protect an employee ~from discriminatory conduct by the employer after the contractual relationship has begun. Patterson v. McLean Credit Union, 491 U.S. at 177; Carter v. South Cent. Bell, 912 F.2d 832 (Sth Cir.1990) cert. denied, _ U.S. ; 111 S.Ct. 2916 (1991).

The plaintiff's cause of action brought under Tex. Rev. Civ. Stat. Ann. Art. 5221k §7.01(a) is also dismissed. The statute of limitations for such a claim is one year. The statute requires that a suit must be filed within one year of the filing of an initial complaint of discrimination. Failure to bring an action within the one year bars the plaintiff's suit. Here, the plaintiff ~filed his initial complaint of racial discrimination on January 15, 1991. Suit was not led until February of 1992, more than one year later.

Finally, the plaintiff's Title VII claim is also dismissed. In a disparate treatment discharge claim under Title VII, the plaintiff must show that he is a member of a protected group, qualified for the position he seeks or held, that he was discharged from that position and replaced by a nonminority. McDcnnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592 (5th Cir. 1992).

Failure to establish all of these elements does not conclusively prevent the plaintiff from moving forward on a claim of racial discrimination if he can show direct evidence of discrimination or evidence of

sufficient racial animus to bypass the four part test outlined in McDonnell Douglas. Young v. City of Houston, Tex., 906 F.2d 177 (Sth Cir. 1990).

The defendant's argument that the plaintiff has failed to make out a prima facie case under McDonnell Douglas is unchallenged and the Court agrees with Mrs. Baird's that the plaintiff's pleadings and evidence fails in this regard. However, as the Court has pointed out, a plaintiff's case will not be dismissed for failing to meet one of the outlined criteria if he can provide sufficient evidence of disparate treatment. Yolling v. City of Houston, Tex., 906 F.2d at 180, 181. In this arena, the plaintiff's evidence is lacking.

The plaintiff's evidence that several employees were permitted to return to work after being injured, fails to address the particularities in each case. In one of the instances the employee was near retirement and was permitted to return for a short period of time to qualify for retirement and health benefits. In another instance, the employee was moved to a job that he had bid for and was otherwise qualified. Finally, Billy Minatrea, one of the plaintiff's comparatives, was not affected by the

Policy because it was not in effect at the time that he was injured.

To show disparate treatment the plaintiff must not only get past the statute of limitations problem in the grievance proceeding, but must show that a job was available for which he could successfully bid on. In each of the three cited instances, the employee obtained a medical release to return to the job that he worked.

The Court turns now to the plaintiff's Union claims. In a suit against a Union for breach of fair representation, the plaintiff is required to sue within six months. Del Costello v. International Brotherhood of Teamsters. et al., 462 U.S. 151 (1983); Farr v. H. K. Porter, 727 F.2d 502, 505 (Sth Cir. 1984). The period begins to r~n when the plaintiff knew or should have known that no further action would be taken on his behalf. Farr, 727.2-i at 505. Stated differently, the time begins to run when the plaintiff "discovers or in the exercise of reasonable diligence would have discovered that no further action would be taken on his grievance." Martin v. Youngstown Steel and Tube Co., 911 F.2d 1239 (7th Cir. 1990). If SLY months elapsed since the plaintiff knew

or would have discovered, with reasonable diligence, that the Union had breached its duty of fair representation prior to February of 1992, the plaintiff would be barred from asserting these claims now. Farr, 727 F.2d at 505.

The record reflects that after the first of December of 1990, the Union was outside the time period for resolving the plaintiff's grievance. the record also reflects that the plaintiff was aware of this fact and knew the consequences of the failure to comply. This is confirmed by the plaintiff's deposition testimony. At a minimum, the plaintiff had a duty to pursue the issue with the Union representative and ascertain the facts about his grievance before February of 1992. The plaintiff's contention that as of February of 1992, he still believed that the Union was acting on his behalf is disingenuous, to say the least. It is clear from the record that the plaintiff knew or could have known that the Union had breached its duty of fair representation by January of 1991. Because this case was filed more than a year later, it is barred by the statute of limitations.

Similarly, the plaintiff's claim for breach of the collective bargaining agreement against Mrs. Baird's

is also barred by the statute of limitations. In cases where an employee has both an action for breach of the collective bargaining agreement against an employer and breach of the duty of fair representation against a Union, the statute of limitations is also six months. Farr, 727 F.2¿ at 505; Del ~o.~,lello, 462 U.S. at i65.

The defendants' motions for summary judgement are GRANTED.

Signed this 18th day of May, 1993.

s /_____

Appendix C - EXHIBIT A

THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JESSIE L. SPENCER,	§	Civil Action
VS.	§	No. H-92-0632
MRS. BAIRD'S BAKERIES, INC.,	§	
THE INTERNATIONAL	§	
BROTHERHOOD OF TEAMSTERS	§	
LOCAL UNION NO. 988	§	

MOTION TO WITHDRAW AS OF-COUNSEL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JOSEPH R. WILLIE, II ("Willie"), Of-Counsel to Plaintiff, Jessie L. Spencer, in the above-entitled and numbered cause and makes his Motion To Withdraw and in support of said motion would respectfully show the Court the following:

I.

Willie entered an appearance in this case on July 28, 1992 as "Of-Counsel" to Plaintiff's attorney-in-charge, Debra V. Jennings, Esquire. The

purpose of Willie's appearance in this case was to consult and advise Plaintiff's attorney-in-charge, Ms. Jennings, on the applicable rules and procedure as it applies to federal courts. At no time did Willie sign any pleadings, attend any depositions or make any representations that he would represent the Plaintiff before this Court.

II

The last count Willie had with Plaintiff's attorney-in-charge, Ms. Jennings, concerning this case was in the latter portion of August, 1992. Since that, time Willie has not been contacted by or consulted with Ms. Jennings concerning any matters pertaining to this case. On December 17, 1992, Willie received a letter from Plaintiff's attorney-in-charge, Ms. Jennings, dated December 16,1992 informing him that this Court had signed an order granting her Motion to Withdraw as Attorney-In-Charge. A true and correct copy of the letter from Ms. Jennings is attached as Exhibit "A" and is incorporated by reference as if fully set out at length herein. At no time did Willie

receive any communications from Ms. Jennings of her intention to withdraw. This situation leaves Willie without an attorney-in-charge to consult and/or advise. Willie does not have now, nor did he ever have possession of the Plaintiff's file. Willie does not have any knowledge of any pleadings filed for or on behalf of the Plaintiff since he made his "Of-Counsel" appearance in this case. Other than receiving communications from this Court and opposing counsels, Willie has not participated in the merits of this case with this Court or with opposing counsels.

III

Ms. Jennings has not complied with Rules 2 D and E of the Local Rules of the Southern Districts of Texas and has placed Willie in an untenable position. Further, Willie respectfully requests that this Court conduct an investigation into the professional conduct of Ms. Jennings pursuant to Rule 4 and Rule 5 of the Rules of discipline of the Southern district of Texas. It is impossible to consult with an attorney-in-charge when that

attorney does not communicate with her "Of-Counsel" nor inform said "Of-Counsel" of her intentions or tactics in the case.

WHEREFORE, pursuant to Rule 2 D of the Local Rules of the Southern District of Texas, Joseph R. Willie, II, respectfully requests that this Court grant his Motion To Withdraw and respectfully requests this Court to conduct an investigation as previously prayed for herein.

Respectfully submitted,

s/_____
U. Lawrence Bozé & Associates

By: s/_____
Joseph R. Willie, II,D.D.S.,

2208 Blodgett, Suite 100
Houston, Texas 77004
(713) 520-0260
(713) 520-6194 (FAX)
Federal Bar # 13746
OF-COUNSEL FOR PLAINTIFF

EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON - DIVISION

JESSIE L. SPENCER,	§	CIVIL ACTION
VS.	§	No. H-92-0632
MRS. BAIRD'S BAKERIES, INC.,	§	
THE INTERNATIONAL	§	
BROTHERHOOD OF TEAMSTERS	§	
LOCAL UNION NO. 988	§	

MOTION TO WITHDRAW AS ADDITIONAL COUNSEL

TO THE HONORABLE COURT:

COMES NOW, JULIUS J. LARRY, III, who was designated as "Additional Counsel" on June 17, 1992, by Plaintiff, Jessie L. Spencer's attorney of record, in the above styled cause and files this Motion To Withdraw and in support thereof, shows the Court as follows:

1. Attorney Debra Jennings asked Julius J. Larry, III to assist her in a deposition that was being

taken of the Plaintiff. Debra Jennings subsequently filed a Notice of Designation of Additional Counsel with this Court. Larry's appearance was to assist Ms. Jennings in the actual trial of this case if it went to trial. Ms. Jennings asked Larry to accompany her to the Rule 16 Scheduling Conference, which he did.

2. Mr. Larry heard nothing else from Ms. Jennings. After he informed all parties that he was no longer assisting Ms. Jennings, he continued to receive communications from defense counsel. Larry wrote a letter to all counsel stating that he was not assisting Ms. Jennings. On December 17, 1992, Larry received a letter from Ms. Jennings that she had withdrawn and that Larry should file a motion with the Court. See Exhibit A.

3. Larry did not enter into any agreements, either written or oral, that he would be "attorney-in-charge" of Ms. Jennings case. Ms. Jennings never informed Larry of her intentions to withdraw. Larry does not now, nor did he ever have possession of

Plaintiff's file. Larry does not have any knowledge of the pleadings filed by Ms. Jennings on behalf of the Plaintiff.

4. Ms. Jennings has failed to comply with Rules 2 D and E of the Local Rules of the Southern district. It appears that Ms. Jennings has abandoned her client, to the client's detriment.

Wherefore, Julius J. Larry, III, respectfully moves the Court to grant his Motion To Withdraw, and for such other relief, at law and in equity, as he may be justly entitled.

Respectfully submitted,

s/_____

EXHIBIT C
December 16, 1992

The Honorable Kenneth Hoyt
United States District Judge
U.S. District Court
Southern District of Texas
515 Rusk, Suite 9513
Houston, Texas 77002

Re: Unauthorized Appearance of Joseph R. Willie, II in Civil Action No. H-92-0632, Jessie L. Spencer v. Mrs. Baird's Bakeries, Inc., The International Brotherhood of Teamster's Local Union No. 988, United States District Court, Southern District of Texas.

Dear Judge Hoyt:

I was formerly managing partner of the firm, Ahmed, Hubbard & Willie, L.L.P., which was dissolved on October 17, 1992 with the unannounced withdrawal of Joseph R. Willie, Jr.. Prior to Mr. Willie's withdrawal, correspondence on the above case would come to the offices of the firm. When Mr. Willie was questioned regarding any involvement he may have had in the case, he denied any such involvement.

We have been provided documentation that shows Mr. Willie filed a Notice of Appearance in the case on July 28, 1992, under the firm's name. The purpose of this letter is to advise the court and all parties that Mr. Willie's appearance in this case was unauthorized and deceptive. His involvement was kept secret from myself and Mr. Hubbard and at no time was Mr. Spencer a client of Ahmed, Hubbard & Willie, L.L.P.. The past representations of Mr. Willie to the contrary are simply untrue.

Please include this letter among the records of the file. By way of carbon copy, all parties are being advised of the situation. Copies of the referenced documents are attached.

Respectfully yours,

s_____

Abdul-Hakim Ahmed, D.D.S., J.D.

Attorney at Law

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON - DIVISION

	§	
JESSIE L. SPENCER,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	H-92-0632
MRS. BAIRD'S BAKERIES, INC.,	§	
THE INTERNATIONAL	§	
BROTHERHOOD OF TEAMSTERS	§	
LOCAL UNION NO. 988	§	
Defendants.		

ORDER

This cause having come on to be heard upon Plaintiff's motion to set aside the order granting summary judgment heretofore entered herein and the Court having considered the argument of counsel and being fully advised it is ORDERED, that the Plaintiff's

motion be and the same hereby is denied.

Dated: June 30, 1993.

EXHIBIT•E

Stephen Perel & Associates, P.C.

Attorneys and counselors at law

Stephen Perel
Board Certified:
Personal Injury trial law & family Law
Texas board of legal specialization

June 18, 1990

Mr. Jerry Land, Plant Manager
Mrs. Baird's Bakeries, Inc.
P.O. Box 924227
Houston, Texas 77292

Re: Board No.: 90-031057-H3
Employee: Jessie Lee Spencer
Employer: Mrs. Baird's Bakeries, Inc.
Date of Injury: November 15, 1989
Insurance Carrier: TEIA
Ins. Co. No.: 0189020826900

Dear Mr. Land:

I represent Mr. Spencer in his workers compensation claim due to the above job related injury. I am in receipt of your letter dated June 5,

1990, in which you threaten to terminate Mr. Spencer's employment if he does not comply with certain conditions.

In case you are not aware, Mr. Spencer has been off work due to a job related injury, which is being handled by Ms. Aurdie Culbert of Texas Employers Insurance Association. I would also like to see some medical information concerning Mr. Spencer's condition, and I suggest that any information you desire concerning Mr. Spencer's medical condition should be obtained from Texas Employer's Insurance Association, or from Dr. Arnold Ravdel, 7333 North Freeway, Houston, Texas.

By copy of this letter, we are notifying Ms. Culbert of Texas Employer's Insurance Association to furnish us with all medical information in their possession, especially from Dr. Ravdel and Parkway hospital.

Mr. Land, you are requested to review article 8307c of the Texas Workers Compensation Act concerning any termination of Mr. Spencer due to his workers compensation Claim.

If you have any questions, please feel free to contact me.

Very truly yours,

Stephen Perel & Associates, P.C.

By: S. / _____

Stephen Perel

SP/kys

cc: Ms. Aurdie Culbert
TEIA
100 Congress, Suite 1060
Austin, Texas 78701

Texas Workers Compensation Commission
1445 North Loop West, Suite 600
Houston, Texas 77008

EXHIBIT F

Rawle Andrews, M.D., Clinic Association
7901 W. Montgomery Road
P.O. Box 38528
Houston, Texas 77238-8528

Office: (713) 447-6534

Residence: (713) 747-7616

July 23, 1990

Mr. Jerry Land

Mrs. Baird's Bakeries

P.O. Box 924227

Houston, Texas 77292

Re: Spencer, Jessie

Dear Mr. Land:

Mr. Jessie Spencer has been under my professional care from November 15, 1989 to the present time, and was last seen by me and evaluated in our clinic on July 17, 1990. Mr. Spencer was also seen and evaluated by Arnold Ravdel, M.D., Orthopaedist. The patient was given an initial trial on a conservative treatment program. This course was pursued through April 8, 1990. Throughout the course of his early treatment the patient seemed to have been progressing satisfactorily. As time went by, however, and as he was urged to engage in more strenous activity it became apparent to Mr. Spencer and also treating physicians that the patient would better benefit from surgical intervention. For sometime prior to that date the matter of surgery was fully discussed with and explained to Mr. Spencer. He pondered over

the matter and decided to accept the surgery especially since medical control seemed uncertain and unpredictable to him.

The patient underwent lumbar laminectory on April 9, 1990 and remained hospitalized through April 17, 1990. Since his discharge from the hospital, Mr. Spencer had been receiving his post operative care essentially from the orthopaedist, Dr. Ravdel. He had been seeing me on a monthly basis for the most part and as his condition demanded.

After consulting with and evaluating Mr. Spencer on July 17, 1990 just over three months after his surgery it was obvious to me that, while his convalesence is satisfactory, returning to his regular duties at this time is not advisable. Further, it is my opinion that, Mr. Spencer would require six months to one year post operatively before it may become feasable, if at all, for him to engage in frequent bending, hauling, pushing or heavy lifting.

S /_____

Sincerely yours,

Rawle Andrews, M.D., Diplomate

American Board of Professional

Disability Consultants

RA/cv

xc: A. Ravdel, M.D.

EXHIBIT G

River Oaks Tower

3730 Kirby Drive, Suite 1200

Houston, Texas 77098

(713) 831-6823

FAX ((713) 522-1088

December 18, 1992

Honorable Kenneth Hoyt

United States District Judge

515 Rusk

Houston, Texas

Re: Spencer v. Mrs. Baird's Bakery, et al;

Civil Action No. 92-0632.

Dear Judge Hoyt

It has been brought to my attention that Mr. Spencer's attorney, Debra Jennings, misrepresented to the Court

that I am the attorney-in-charge in this matter. Nothing could be farther from the Truth. Ms. Jennings asked me to assist her at a deposition. I volunteered my time and did so. Later, she asked me to go with her to the Rule 16 Scheduling Conference, which I did.

Now that Mr. Spencer has paid Ms. Jennings, she has taken his money and dumped his case on the eve of the trial, while attempting to force her client on other attorneys.

My investigation revealed that Mr., Spencer retained Ms. Jennings in February, 1992. Although she represented to him that she would file and prosecute his case in federal court, she was not licensed to practice in the Southern District at that time. Perhaps she has become licensed since that time.

Generally, Courts do not allow attorneys to withdraw without a substitution of other counsel who agrees to the substitution. I told Ms. Jennings that I would assist her in the actual trial of this case. At no time did we discuss my being the attorney-in-charge of her case.

S /_____

Supreme Court, U.
FILED
APR 17 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. 94-1521

JESSIE L. SPENCER,
Petitioner,

vs.

MRS. BAIRD'S BAKERIES, INC. and
INTERNATIONAL BROTHERHOOD
OF THE TEAMSTERS UNION LOCAL NO. 988,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR MRS. BAIRD'S BAKERIES, INC. IN OPPOSITION

*James V. Carroll III**
Andrews & Kurth L.L.P.
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200
Telecopy No. (713) 220-4285

* *Counsel of Record*

BEST AVAILABLE COPY

II.
LIST OF AFFILIATED COMPANIES

Mrs. Baird's Bakeries, Inc. has no affiliated companies.

III.
TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

A. Background Facts 2

B. Proceedings In The Courts Below 4

THE REASONS THE PETITION SHOULD BE DENIED 6

A. The questions presented in support of the Petition for Writ of Certiorari were not raised by the Petitioner in any of the proceedings in the lower courts. 6

B. The questions presented for review are not sufficient reasons under Supreme Court Rule 10 for granting a writ of certiorari. 10

CONCLUSION 12

PROOF OF SERVICE 13

IV.
TABLE OF AUTHORITIES

I. Cases

E.E.O.C. v. Federal Labor Relations Authority,
476 U.S. 25, 106 S.Ct. 1678 (1986) 6

Demarest v. Manspeaker,
498 U.S. 184, 111 S.Ct. 599 (1991) 6

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189, 109 S.Ct. 998 (1989) 6

Texas Division-Tranter, Inc. v. Carrozza,
876 S.W.2d 312 (Tex. 1994) 10

U.S. v. Alvarez-Sanchez,
114 S.Ct. 1599 (1994) 6

II. Rules, Regulations and Statutes

5th Cir. R. 47.5 1

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1981 4

Texas Labor Code § 451.001 7

TEX. REV. CIV. STAT. ANN. art. 5221k § 7.01(a) 4

Title VII of the Civil Rights Act of 1964 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO. 94-1521

JESSIE L. SPENCER,
Petitioner,

vs.

MRS. BAIRD'S BAKERIES, INC. and
INTERNATIONAL BROTHERHOOD
OF THE TEAMSTERS UNION LOCAL NO. 988,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR MRS. BAIRD'S BAKERIES, INC. IN OPPOSITION

OPINIONS BELOW

Pursuant to Local Rule 47.5, the Court of Appeals for the Fifth Circuit determined that its opinion affirming the district court should not be published. 5th CIR. R. 47.5. The content of the Fifth Circuit's

unpublished opinion, however, is reprinted in Appendix A of Petitioner's Petition for Writ of Certiorari. [Pet. App. at 1a-4a][1]

Likewise, the district court did not publish its memorandum order granting Respondents' motions for summary judgment. The district court's memorandum order is reprinted in Appendix B of Petitioner's Petition for Writ of Certiorari. [Pet. App. 5a-21a]

JURISDICTION

Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

A. ***Background Facts.***

This case arose out of the termination of the Petitioner's employment by Respondent Mrs. Baird's Bakeries, Inc. ("Mrs. Baird's") in October of 1990. While he was employed by Mrs. Baird's, the Petitioner

---

1/ Citations to Petitioner's Petition for Writ of Certiorari are referred to as "Pet.," followed by the page number. Citations to the appendix included with the Petition for Writ of Certiorari are referred to as "Pet. App.," followed by page number.

was injured in November of 1989 and required surgery. [Pet. App. 6a.] At the time, Mrs. Baird's had a policy that it may terminate an employee who has been off work for six months or more due to illness or injury. After Petitioner had been absent from work for over six months, Mrs. Baird's sent him a letter asking about the status of his health. [*Id.*] Mrs. Baird's policy requires that the employee respond to this inquiry within 30 days and provide a date when the employee will return to full-time work. [Pet. App. 7a.]

The Petitioner never responded to this letter. [*Id.*] After sending another letter to Petitioner in July of 1990, Mrs. Baird's finally received responses from both the Petitioner and his physician. [*Id.*] Both letters stated that it was possible that the Petitioner would not ever be able to return to work. [Pet. App. 7a-8a.] After several months passed, Mrs. Baird's met with the Petitioner in October 1990 and terminated his employment based on the information provided by the Petitioner and his physician and because he had been absent from work for almost one year. [Pet. App. 8a.]

The Petitioner protested his termination and requested that Mrs. Baird's contact his physician again. [*Id.*] Mrs. Baird's contacted the physician and received another letter which stated that the physician was unable to provide an estimated date when the plaintiff would be able to perform the duties of his job. [*Id.*] As a result, Mrs. Baird's did not change its decision. [*Id.*]

B. ***Proceedings In The Courts Below.***

The Petitioner's original complaint filed in the district court alleged breach of the duty of fair representation against the Union based on the Union's actions regarding the Petitioner's grievance protesting his termination. [Pet. App. 10a-11a.] He also alleged that his termination was a breach of the collective bargaining agreement by Mrs. Baird's and was racial discrimination by Mrs. Baird's based on 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, and Tex. Rev. Civ. Stat. Ann. art. 5221k § 7.01(a) (Vernon 1990). [*Id.*]

The Petitioner's original complaint did not allege any claims under the Texas Workers' Compensation

Act or the Texas Code of Professional Responsibility, which the Petitioner now presents as the sole questions for review in his Petition for Writ of Certiorari.

Respondents, International Brotherhood of the Teamsters Union Local No. 988 and Mrs. Baird's, both filed motions for summary judgment in the district court on all claims. [Pet. App. 5a.] On May 18, 1993, the United States District Court for the Southern District of Texas granted the Respondents' Motions for Summary Judgment on all claims. [Pet. App. 5a-21a.]

On June 15, 1993, Petitioner filed a Motion for Relief from the Summary Judgment Order under Federal Rule of Civil Procedure 60(b). [R. 1029] The District Court denied the Petitioner's Motion on June 30, 1993. [R. 1037]

On November 15, 1993, Petitioner filed an appeal to the Fifth Circuit from the District Court's denial of the Rule 60(b) Motion. [R. 1044] On July 20, 1994, the Fifth Circuit affirmed the judgment of the District Court and stated that, "Spencer fails to show that the district court's denial of his Rule 60(b) motion was so

unwarranted as to constitute an abuse of discretion." [Pet. App. at 4a]–

THE REASONS THE PETITION SHOULD BE DENIED

A. *The questions presented in support of the Petition for Writ of Certiorari were not raised by the Petitioner in any of the proceedings in the lower courts.*

Issues not raised by the Petitioner in either the Court of Appeals or the District Court cannot be the basis of review by the United States Supreme Court. The United States Supreme Court generally refrains from addressing issues not raised in the lower courts by the Petitioner. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 25, 106 S.Ct. 1678, 1681 (1986) (Court dismissed writ of certiorari); *see also U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n. 5 (1994); *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 603 (1991); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2 (1989).

The Petitioner states two questions for review by the Court:

1. Is discrimination against and [sic] employee prohibited, and a person may not discharge or in any other manner discriminate against an employee because the employee has filed a workers' compensation claim in good faith, and was terminated from employment while under the doctor's care, drawing workers' compensation in violation of 451.001 discrimination against employees prohibited?

2. Does a lawyer violate Texas code of professional responsibility of the Texas disciplinary rule of professional conduct, code printed version's Texas codes annotated volume 3 of the government code title 2 subtitled G appendix article X section 9 when she is allowed to file a case in the United States District Court and not licensed to do so at the time?

[Pet. at i.] Petitioner's questions relate to a claim under Texas Labor Code § 451.001 and a complaint regarding

the professional conduct of the attorney who represented the Petitioner in District Court. Neither of these claims was ever raised by the Petitioner in any of the lower court proceedings prior to the Petition for a Writ of Certiorari.

The Petitioner's Original Complaint alleged a claim against the Union for breach of the duty of fair representation and claims against Mrs. Baird's for breach of a collective bargaining agreement and racial discrimination. The District Court granted the Respondents' Motions for Summary Judgment on all of these claims. Neither a workers' compensation claim nor a complaint regarding Petitioner's attorney's conduct were ever presented to or decided by the District Court.

The Petitioner did not appeal the Court's grant of the Respondents' Motions for Summary Judgment. Instead, the Petitioner filed a Rule 60(b) Motion with the District Court, which the District Court denied. Again, the questions presented by the Petitioner in his

Petition for Writ of Certiorari were neither presented or decided by the District Court.

The Petitioner then appealed the District Court's denial of the Motion for Reconsideration under Rule 60(b). The Court of Appeals affirmed the District Court's decision. Thus, the U.S. Court of Appeals for the Fifth Circuit only reviewed the District Court's decision denying the Rule 60(b) Motion and did not even address any issues regarding the Petitioner's termination of employment by Mrs. Baird's.

Therefore, neither the District Court nor the Court of Appeals addressed or reviewed any issues regarding workers' compensation discrimination or the Texas Rules of Professional Responsibility. Nevertheless, for the first time, the Petitioner asks the U.S. Supreme Court to decide whether his termination violated the antidiscrimination clause in the Texas Workers' Compensation Act.[2] In addition, for the first

---

2 Specifically, Petitioner claims that Mrs. Baird's policy of terminating employees on workers' compensation for longer than six months violates

(footnote continued on next page)

time, the Petitioner claims that the attorney that represented him in District Court violated a rule of professional conduct because she was not licensed to practice before the District Court at the time she filed the Complaint. There is no record of these issues in the lower courts, and these issues were never litigated in the District Court or Court of Appeals. Therefore, the Court should deny the Petition for Writ of Certiorari.

B. ***The questions presented for review do not ratify the criteria under Supreme Court Rule 10 for granting a writ of certiorari.***

Rule 10 of the Supreme Court Rules lists several grounds on which the Court will consider review on Writ of Certiorari. The questions presented by the Petitioner do not come within any provision of Rule 10.

(footnote continued from previous page)

> the anti-discrimination provision of the Texas Workers' Compensation Act. [Pet. at 8]. Petitioner is incorrect for two reasons. First, Petitioner misstates Mrs. Baird's policy. The policy provides that any employees absent more than six months because of injury or illness may be terminated. [Pet. App. 69]. Second, the Texas Supreme Court has held that, "uniform enforcement of a reasonable absence-control provision . . . does not constitute retaliatory discharge." *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994).

Generally, the three reasons listed in Rule 10 are:

1. A United States Court of Appeals' decision in conflict with a decision in another United States Court of Appeals on the same matter;
2. A state court of last resort decision on a federal question in conflict with a decision of another state court of last resort or a United States Court of Appeals;
3. A state court or United States Court of Appeals' decision on an important question of federal law which has not been, but should be, settled by this Court, or conflicts with applicable decisions of this Court.

Rule 10 (.1).

Petitioner's questions presented for review by this Court do not meet any of these criteria. First, as described above, the questions presented for review in Petitioner's Petition for Writ of Certiorari are not questions that were even decided by the Court of Appeals, as required by Rule 10(.1)(a) and (c). Second, the questions presented in the Petition for Writ of

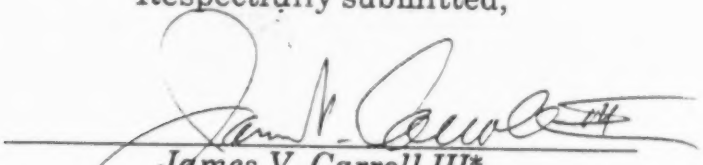
Certiorari are not federal questions as required by Rule 10 (.1)(b) and (c).

Thus, the questions presented in the Petition for Writ of Certiorari are not sufficient under Rule 10 to merit review by the Court.

CONCLUSION

For these reasons, review of this case by the Court is not warranted and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



*James V. Carroll III**
Andrews & Kurth L.L.P.
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200
Telecopy No. (713) 220-4285

*Counsel of Record

ATTORNEYS FOR RESPONDENT
MRS. BAIRD'S BAKERIES, INC.

PROOF OF SERVICE

James V. Carroll III of Andrews & Kurth L.L.P. deposes and states that he served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

Jessie L. Spencer
Petitioner Pro Se
10125 Rockaway
Houston, Texas 77016
713/631-9360

James L. Hicks, Jr.
Law Offices of Hicks and Associates, P.C.
1420 W. Mockingbird Lane, Suite 760
Dallas, Texas 75247

and by depositing same in the United States mail at Houston, Texas, on the 13th day of April, 1995. James V. Carroll III further deposes and states that all parties required to be served have been served.

James V. Carroll III